DR. KOK CHEE MIN

v.

KAN CHOY YOONG & 3 ORS.

HIGH COURT, TAIPING
DATO' HJ ABDUL MALIK BIN HJ ISHAK JC
[CIVIL SUIT NO. RS11-4-94 (T)]
10 JUNE 1994

PRACTICE & PROCEDURE: Consent judgment to give up vacant possession of controlled premises - Parties represented by Counsels - Consent judgment recorded by Magistrate - Appellant/tenant who consented to judgement applied for stay of execution pending appeal as Magistrate had no jurisdction to record consent judgment - Section 16 of Control of Rent Act, 1966 - Respondent/landlord obtained leave for writ of possession to enforce consent judgment - Application for stay rejected by Magistrate - Appellant applies to High Court for stay of execution pending appeal.

In this case, the appelant, a doctor, entered into a consent judgment with the respondent in respect of a controlled premises and the same was recorded by the Magistrate. The terms of the consent judgment were that:

(1) the appellant to give up vacant possession of the premises;
(2) the appellant to pay the quit rent and assessment;
(3) the appellant to pay the arrears of rent.

The appellant fulfilled his obligation under the 2nd and 3rd part of the consent judgment but refused to comply with the 1st part of consent judgment and continued to remain in the said premises. The appellant's 1st application for stay of execution of the consent judgment was dismissed with costs by the learned Magistrate. In the meantime, the respondents obtained leave on 21 April 1994 for writ of possession to be issued to enforce the consent judgment. The appellant's 2nd application to stay execution of the order dated 21 April 1994 and also the consent judgment was dismissed by the learned Magistrate on 27 May 1994.

The appellant applied by way of a summons in chambers to stay, firstly, the order of the learned Magistrate dated 21 April 1994 and secondly, the consent judgment until disposal of the appeal before the High Court, Taiping.

Held:

[1] The consent judgment still remains in its original form. No attempt was made by the appellant to challenge the consent judgment.

[2] The appellant is a doctor by profession, an educated person and not an iliterate; he must have been advised by his Counsel to enter into the judgment. It is now not open to the appellant to allege that the consent judgment, in particular the first part, is against s. 16 of the Control of Rent Act 1966.

[3] The learned Magistrate cannot be made to be a fool for recording the consent judgment for he was merely performing his judicial function. The learned Magistrate did not make any mistake when he recorded the consent judgment.

[4] It is now established that the Court has an absolute unfettered discretion in deciding whether to grant or refuse a stay. And that an application for a stay must always be supported by an affidavit of special circumstances.

[5] In this case, neither merits or strong grounds for an appeal nor the validity or corrrectness of the judgment appealed from are special circumstances which would entitle the appellant to a stay of execution.

[Application for stay of execution dismissed with costs].

Cases referred to:

Barton & Anor. v. Fincham [1921] 2 KB 291 ***(dist)***
Lim Kim Chuan v. Hari Singh [1981] 1 MLJ 241 ***(dist)***
S. Pakianathan v. R. K. Stallard [1979] 2 MLJ 251 ***(refd)***
Haji Mohamed Zabedi bin Haji Salleh & Anor. v. Dato' Haji Abdullah bin Mohd. Hussin & 3 Ors. And Dewan Perniagaan Dan Perusahaan Melayu Malaysia (Intervenor) [1994] 1 CLJ 70 ***(cit)***
Wee Choo Keong v. MBf Holdings Bhd. & Anor. And Another Appeal [1993] 3 CLJ 210 ***(foll)***
Leong Poh Shee v. Ng Kat Chong [1966] 1 MLJ 86 ***(refd)***
Serangoon Garden Estate Ltd. v. Ah Keng [1953] MLJ 116 ***(refd)***
Monk v. Bartman [1981] 1 QB 346 ***(cit)***
Atkins v. GW Ry [1886] 2 TLR 400 ***(refd)***
Hoo Hua v. Lee Hin & Ors. [1985] 1 MLJ 149 ***(refd)***

Legislation referred to:

Control of Rent Act 1966, s. 16
Subordinate Courts Rules, O. 26A r. 2, Form 75A
Increase of Rent and Mortgage Interest (Restrictions) Act 1920, s. 5 (UK)

Other sources referred to:

Halsbury's Laws of England, 3rd Edn., Vol. 16 p. 35; 4th Edn., Vol. 17, para 451, p. 270

For the appellant - Ng Man Kit; M/s. M.K. Ng & Associates
For the respondents - Ng Poh Tat; M/s. Ng Poh Tat & Co.

JUDGMENT

Hj Abdul Malik Bin Hj Ishak JC:
The respondents were co-owners of controlled premises located at No. 23, Main Road, Sungai Siput North ("the controlled premises"). On 16 August 1966, the respondents leased the controlled premises to the appellant for a period of twenty-five years (25) and that lease was scheduled to expire on 1 September 1991. By letter dated 9 August 1991, the respondents through their Solicitors sent a notice to quit to the appellant, to be effective on or before 15 November 1991 - thus giving the appellant ample time to vacate the controlled premises. As expected, the appellant ignored the notice to quit and continued to be in occupation of the controlled premises. The appellant, a medical doctor, had set up a clinic under the style of "Kok Clinic" at the controlled premises and refused to budge citing, *inter alia*, the reasons that, "saya telah menduduki premis itu untuk selama nyaris-nyaris 30 tahun sehingga kini dan premis ini mempunyai nilai sentimental kepada saya" (see enclosure 3A, paragraph 6). Undaunted, the respondents applied in the Magistrate's Court, Sungai Siput North, Perak by way of notice of application under O. 26A, r. 2 of the Subordinate Courts Rules ("the SCR") for vacant possession, mense profits at the rate of RM104 per month from 2 September 1991 till the date of the surrender of vacant possession of the controlled premises and costs; which application was supported by an affidavit affirmed by the first respondent on 24 June 1992 on behalf of herself and the rest of the repondents; which affidavit verified the facts on which the application was based in compliance with the format in Form 75A of the SCR. The appellant, on being advised by his Counsel, entered into a consent judgment with the repondents dated 27 November 1992 ("the consent judgment"). There were three parts to the consent judgment as recorded by the learned Magistrate:

The first part of the consent judgment reads thus:

> **Dengan Persetujuan Adalah Diperintah Pada Hari Ini** bahawa defendan dan semua orang yang menduduki premis no. 23, Main Road, Sungai Siput Utara, Perak melalui defendan menyerahkan milik kosong tersebut kepada plaintif selewat-lewatnya pada 1 Januari 1994.

The second part of the consent judgment reads thus:

> **Dengan Persetujuan Adalah Selanjutnya Diperintahkan Pada Hari Ini** bahawa defendan membayar kepada plaintif Hasil Tanah dan Hasil Taksiran (Cukai Pintu) bagi tahun 1992 berjumlah RM873 dan bagi tahun 1993 yang berjumlah RM5373 apabila dikehendaki pada waktu yang ditetapkan oleh pihak Berkuasa yang berkenaan.

The third part of the consent judgment reads thus:

> **Dengan Persetujuan Adalah Juga Diperintahkan** bahawa defendan membayar kepada plaintif wang sewa ke atas premis tersebut berjumlah RM780 yang merupakan tunggakan sewa bulanan dari bulan September 1991 hingga November 1992 dan seterusnya wang sewa bulanan sebanyak RM52 mulai bulan Disember 1992 sehingga bulan Disember 1993.

The appellant fulfilled his obligations under the second and third parts of the consent judgment (see exhibits "K3" and "K4" of enclosure 9) but refused to obey the first part of the consent judgment and continued to remain in the controlled premises. On 7 February 1994, the appellant applied by way of a notice of application ("the first application") to the Magistrate, Sungai Siput North, Perak for stay of execution of the consent judgment till 31 March 1994 supported by an undated affidavit of the appellant wherein the appellant requested for time to enable him to move his clinic to a new premise at No. 118, Jalan Besar, 31100 Sungai Siput, Perak ("No, 118 Jalan Besar"). On 21 April 1994, the learned Magistrate after hearing the submissions of both parties dismissed the first application with costs. It transpired that on 21 April 1994, the appellant vacated the controlled premises (see photographs at "KlO" in enclosure 9) and occupied the premises at No. 118, Jalan Besar and there he carried out his medical practice. The appellant, however, displayed his stubborness and refused to surrender the keys of the controlled premises to the respondents and, consequently, he also refused to surrender vacant possession to the respondents.

This prompted the respondents to obtain leave of the Magistrate's Court, Sungai Siput North

for writ of possesion to be issued to enforce the consent judgment and such leave was obtained on 21 April 1994.

Meantime, the appellant filed an application ("the second application") in the Magistrate's Court, Sungai Siput North, Perak to stay executions of not only the order dated 21 April 1994 for the first application but also the consent judgment. The learned Magistrate dismissed the second application on 27 May 1994. In due course, the respondents entered the controlled premises and took possesion of it with the assistance of the Court bailiff and the police from Sungai Siput North police station on 27 May 1994. By that time the appellant had stopped operating his clinic at the controlled premises and from the photographs at "K10" in enclosure 9, it can be surmised that the appellant was in the process of vacating the controlled premises. It was at this time that the appellant surrendered the keys to the controlled premises to the respondents.

The appellant now applies by way of a summons in chambers (enclosure 3) to stay, firstly, the order of the learned Magistrate dated 21 April 1994 and, secondly, the consent judgment until disposal of the appeal before the High Court, Taiping, Perak.

Several grounds were put forward for stay of execution. It was averred in the affidavit of the appellant in enclosure 3A that the Solicitors were directed to lodge appeals against the orders of the learned Magistrate, Sungai Siput North for the reasons that the Magistrate had no jurisdiction to give those orders. This ground seems to be grounded on the argument that the consent judgment was a nullity on the ground that the learned Magistrate had no jurisdiction to make an order for vacant possession (the first part of the consent judgment) because of the provisions of the Control of Rent Act 1966 (Act 363) ("the CRA"). Counsel for the appellant relied on the English case of *Barton & Anor v. Fincham* [1921] 2 KB 291 where Bankes L. J. construed s. 5 of the Increase of Rent and Mortgage Interest (Restrictions) Act 1920 to the effect that the jurisdiction of the Court to make an order for possession must be restricted to instances specified in the section and to no others. This is what Bankes LJ said:

> In the case of the restriction on the right to possession s. 5 provides as follows: 'No order or judgment for the recovery of possession of any dwelling house to which this Act applies, or for the ejectment of a tenant therefrom, shall be made or given unless ....' Then follows in a series of sub-sections a list of the instances in which an order or judgment may be made or given. It appears to me that the Legislature in reference to claims for possession has secured its object by placing the fetter, not upon the landlord's action, but upon the action of the Court. The language used is so clear and precise that there is in my opinion no room for cutting down or restricting the operation of the section. The Legislature has definitely declared that the Court shall exercise its jurisdiction only in the instances specified in the section, and in no others.

In another part of his judgment, his Lordship said:

> In my opinion s. 5 is an instance of a case where the Legislature has in clear and unmistakable language restricted the jurisdiction of the Court, and where no agreement between parties can give the Court a jurisdiction which the Legislature has said it is not to exercise.

The English s. 5 of the Increase of Rent and Mortgage Interest (Restrictions) Act 1920 found its equivalent in our s. 16 of the CRA and Chang Min Tat FJ (as he then was) had occasion to deal with s. 16 of the CRA in the case of *Lim Kim Chuan v. Hari Singh* [1981] 1 MLJ 241 FC. Speaking for the Federal Court, his Lordship had this to say:

> The premises are controlled premises and come under the provisions of the Control of Rent Act No. 56 of 1966. Section 16 restricts the common law rights of a landlord to possession except under any of the cases in (a) to (m). Before any landlord can hope to recover possession of his controlled premises he must therefore be able to bring his claim within one of these listed cases.

The facts in *Barton & Anor v. Fincham (supra)* were that the defendant, Mrs. Fincham, was and had been for twelve years the tenant of a house to which the Increase of Rent and Mortgage Interest (Restrictions) Act 1920, applied, and had paid her rent monthly. The plaintiff bought the house subject to the tenancy. He desired to sell the house with vacant possession. He therefore made an agreement with the defendant that she in consideration of £20 should give him notice to quit, and should peaceably yield up possession at Michaelmas,

1920. The agreement was in writing dated 22 July 1920, and signed by the defendant; the £20 was duly paid by the plaintiff, and notice to quit was duly given by the defendant. When Michaelmas arrived the defendant refused to give up possession, but she did not repay or tender the 20 1. The plaintiff then brought an action in the county Court to recover possession of the house and mesne profits.

The facts in *Lim Kim Chuan v. Hari Singh (supra)* were that the respondent had let certain premises to the appellant. The premises were rent-controlled and the rent was RM50 a month. The respondent sought to increase the rent to RM125 a month but the respondent did not agree and there was no agreement in writing. The respondent claimed possession on the ground that rents at RM125 a month were in arrears.

Clearly therefore the facts in both these cases are poles apart from the present case. In the present case, the lease of 25 years standing was scheduled to expire on 1 September 1991, and by letter dated 9 August 1991, the respondents sent a notice to quit to the appellant. The respondents further sought the aid of the Magistrate's Court at Sungai Siput North by filling an application under O. 26A, r. 2 of the SCR to obtain vacant possession, mesne profits and costs and arising out of this both parties entered into a consent judgment on 27 November 1992. Till today that consent judgment still remains in its original form. No attempt was made by the appellant to challenge the consent judgment like what was done in *S. Pakianathan v. R.K. Stallard* [1979] 2 MLJ 251 FC, where the Federal Court set aside a consent order on the ground that the consent given by the solicitor was without the authority of the party. In the present case, the appellant is a doctor by profession, an educated person and not an illiterate; he must have been advised by his Counsel to enter into the consent judgment and it is now not open to him to allege that the consent judgment, in particular, the first part, is against s. 16 of the CRA. His Counsel must have advised him before recording the consent judgment before the learned Magistrate. The learned Magistrate cannot be made to be a fool for recording the consent judgment for he was merely performing his judicial function. The learned Magistrate did not make any mistake when he recorded the consent judgment. If at all there is a mistake - that mistake lies with the Counsel who so negligently advised the appellant to enter into the consent judgment. In the present case: "There was no error in expressing the intention of the Court when the consent order was drawn up. Everything was laid on the table" (see *Haji Mohamed Zabedi bin Haji Salleh & Anor v. Dato' Haji Abdullah bin Mohd. Hussin & 3 Ors. And Dewan Perniagaan Dan Perusahaan Melayu Malaysia (Intervenor)*[1994] 1 CLJ 70). The appellant's remedy is against the negligent Counsel and not to take cudgel against the learned Magistrate. From the recital of the facts, the appellant took time to obey the consent judgment. That the consent judgment must be obeyed is now beyond question. The Lord President in the recent case of *Wee Choo Keong v. MBf Holdings Bhd. & Anor. And Another Appeal* [1993] 3 CLJ 210 SC had this to say on the question of obedience to a Court order:

> It is established law that a person against whom an order of Court has been issued is duty bound to obey that order until it is set aside. It is not open for him to decide for himself whether the order was wrongly issued and therefore does not require obedience. His duty is one of obedience until such time as the order may be set aside or varied. Any person who fails to obey an order of Court runs the risk of being held in contempt with all its attendant consequences.

That sums up the precarious position of the appellant had he persisted in ignoring the consent judgment. Next, it was also averred in the affidavit of the appellant in enclosure 3A that there were merits or strong grounds for an appeal and that there were grounds affecting the validity or correctness of the consent judgment and, consequently, a stay for execution should be granted.

It is now established that the Court has an absolute and unfettered discretion in deciding whether to grant or refuse a stay. And that an application for a stay must always be supported by an affidavit of special circumstances (*Leong Poh Shee v. Ng Kat Chong* [1966] 1 MLJ 86). It is further established by a long line of authorities that the Court will not deprive a successful party of the fruits of his litigation until an appeal is determined, unless the unsuccessful party can show special circumstances to justify if (see for instance *Serangoon Garden Estate Ltd. v. Ah Keng* [1953] MLJ 116).

Halsbury's Laws of England, 3rd Edn., Vol. 16 at p. 35 states:

> The Court has an absolute and unfettered discretion as to the granting or refusing a stay, and as to the terms upon which it will grant it, and will, as a rule, only grant it if there are special circumstances, which must be deposed to on affidavit unless the application is made at the hearing.

See also *Monk v. Bartman* [1981] 1 QB 346 CA which echoes the same principle.

But the power of the Court to stay is limited in its scope. This is supported by a passage appearing in 17 **Halsbury's Laws of England** (4th Edn.) [1976] para 451 at p. 270:

> ... the Court's inherent jurisdiction to stay the execution of a judgment or order is limited in its extent, and can only be exercised on grounds that are relevant to a stay of the enforcement proceedings themselves, and not to matters which may operate as a defence in law or relief in equity, for such matters must be specifically raised by way of defence in the action itself.

Thus, grounds affecting the validity or correctness of the consent judgment are not special circumstances. This is because, as was said by Lord Esher MR in *Atkins v. GW Ry* [1886] 2 TLR 400: "strong grounds for an appeal is no reason for a stay of execution, for no one ought to appeal without strong grounds for doing so." In my judgment, neither merits or strong grounds for an appeal nor the validity or correctness of the judgment appealed from are special circumstances which would entitle the appellant to a stay of execution.

There is another point that needs mention. It is this. The appellant had already vacated the controlled premises and therefore an order to stay execution would be completely academic (*Hoo Hua v. Lee Hin & Ors.* [1985] 1 MLJ 149 SC) and, if I may add, an exercise in futility.

For the reason adumbrated above, the application for a stay of execution was therefore dismissed with costs.

ELECTRONICA SALES & SERVICES PVT. LTD.

v.

SFE MACHINERY SDN. BHD.

HIGH COURT, KUALA LUMPUR
DATO' SITI NORMA YAAKOB J.
[CIVIL SUIT NO. D2-22-342-93]
12 NOVEMBER 1993

PRACTICE & PROCEDURE: Order 14 RHC - Whether any triable issues - Whether affidavit in support of application in the proper form - Affidavit in support affirmed by solicitor for the plaintiff - Whether affidavit evidence constitutes hearsay - Whether the court can rely on such evidence - Consideration of O. 14 r. 2 (Form 18), O. 41 rr. 5(1), 5(2) Rules of the High Court 1980 - Whether provisions of Order 41 r. 5(1) applicable to interlocutory proceedings - Post-dated cheques issued by defendant - Cheques dishonoured - Notification to defendant - No denial by defendant - Reliance by plaintiff on letter of admission of indebtedness - Allegation by defendant that letter of admission executed under duress and undue influence - Allegation not raised previously - Whether fatal.

The cause of action against the defendant was based on 3 post-dated cheques drawn by the defendant in favour of the plaintiff which were dishonoured when presented for payment. The defendant received notification of the dishonoured cheques when solicitors for the collecting agent, wrote to the defendant on 20 February 1992 demanding payment for the cheques and again on 9 December 1992 when the plaintiff sent their letter of demand. The defendant did not deny having drawn the 3 post-dated cheques totalling US$2,700 nor that the cheques were issued in payment of the balance sum due on a machine they had purchased from the plaintiff. The plaintiff applied for summary judgment pursuant to O. 14 of the Rules of the High Court 1980 (RHC).

Two issues were raised by the defendant in resisting this application: (1) that the affidavit in support of the application was not in the proper form; (2) that there were no merits to the application. In raising these issues the defendant contended that the affidavit in support affirmed by the instructing solicitor for the plaintiff should have been filed by the plaintiff and none other failing which the evidence constituted hearsay and could not be